1-1-1954

What the Supreme Court Did Not Do During the 1952 Term

Fowler V. Harper
Yale Law School

Follow this and additional works at: http://digitalcommons.law.yale.edu/fss_papers

Part of the Law Commons

Recommended Citation
What the Supreme Court Did Not Do During the 1952 Term (with A. Leibowitz), 102 University of Pennsylvania Law Review 427 (1954)

This Article is brought to you for free and open access by the Yale Law School Faculty Scholarship at Yale Law School Legal Scholarship Repository. It has been accepted for inclusion in Faculty Scholarship Series by an authorized administrator of Yale Law School Legal Scholarship Repository. For more information, please contact julian.aiken@yale.edu.
WHAT THE SUPREME COURT DID NOT DO DURING THE 1952 TERM

Fowler V. Harper † and Arnold Leibowitz ‡

CONTRADICTIONS FROM THE COURT

This is the fourth ¹ and last of a series of studies made in an attempt to throw some light on the operation of the certiorari jurisdiction of the Supreme Court. On the whole, this has been a baffling and frustrating experience. One can get statistics by the simple process of counting and classifying. But it is far more difficult to get the information necessary to make meaningful the data on this phase of the Court’s behavior. It is next to impossible to find out much about the several hundred cases which clog the Miscellaneous Dockets. Even as to cases on the Appellate Docket, one would need the time of the nine Justices and their staffs to have much confidence in his judgment. Nor has the Court itself been of much help. Indeed, the confusion, which these articles have emphasized if they have not removed, has, if anything, been confounded by the views of the Justices as expressed during the last term. Certainly the profession is no nearer an understanding of the effect of a denial of certiorari. Those of its members who took Mr. Justice Frankfurter at his frequently expressed word that a denial means only that fewer than four Justices vote to review, now have the uncomfortable assurance that four members of the Court

† Professor of Law, Yale Law School; author of HARPER ON TORTS and other books.
‡ Member of the Third Year Class, Yale Law School.
¹ The previous studies are: Harper and Rosenthal, What the Supreme Court Did Not Do in the 1949 Term, 99 U. of Pa. L. Rev. 293 (1950); Harper and Etherington, What the Supreme Court Did Not Do During the 1950 Term, 100 U. of Pa. L. Rev. 354 (1951); Harper and Pratt, What the Supreme Court Did Not Do During the 1951 Term, 101 U. of Pa. L. Rev. 439 (1953).
think that it may mean a great deal more. Those of us who thought this all along find that four other members of the Court agree with Justice Frankfurter.

This explosion of contradictions came in February in a series of habeas corpus cases brought by state convicts under death sentences for rape and murder.\(^2\) Only three months before, on the denial of a rehearing on a petition for a writ of certiorari by Julius and Ethel Rosenberg, Justice Frankfurter had stated his usual position: "Misconception regarding the meaning of such a denial persists despite repeated attempts at explanation. It means and all that it means is, that there were not four members of the Court to whom the grounds on which the decision of the Court of Appeals was challenged seemed sufficiently important when judged by the standards governing the issue of the discretionary writ of certiorari."\(^8\) But now Justice Frankfurter finds that four of his brethren shared the "misconception," at least so far as concerned habeas corpus cases.

It is true that petitions by state prisoners for the writ of habeas corpus in federal courts present peculiar problems. One is whether the exhaustion of state remedies requires a petition in the Supreme Court for certiorari to the highest court of the state. While it is true, as Mr. Justice Jackson points out,\(^4\) that it sounds silly to discuss a petition for certiorari in the Supreme Court of the United States as a "state remedy," nevertheless \textit{Darr v. Burford}\(^5\) imposes such a requirement and, regardless of semantics, this seems to be accepted by all the Justices.

The cases involved review of judgments of the Court of Appeals for the Fourth Circuit, first argued in 1951, reargued in 1952 and decided in 1953. In each case, petitions for certiorari in the Supreme Court for direct review of the convictions in the state court had been denied. On habeas corpus in each case, the federal district court, in determining the propriety of granting the writ, considered the effect of the Supreme Court's denial of certiorari on the same constitutional questions. In so doing, the district judges had precedents both for and against such consideration.\(^6\) To use Mr. Justice Frankfurter's


\(^3\) Rosenberg v. United States, 344 U.S. 889 (1952).

\(^4\) "To say that our command to certify the case to us is a state remedy is to indulge in a fiction, and the difficulty with fictions is that those they are most apt to mislead are those who proclaim them." Brown v. Allen, 344 U.S. 443, 542 (1953) (concurring opinion).


\(^6\) Mr. Justice Reed cites the precedents in footnote 4 (p. 451) of his opinion as follows: "The courts below have divided since the \textit{Darr} case on the effect to be
own words, "the Court of Appeals relied heavily on our denial of certiorari in ruling against applications for federal habeas corpus. . . ." 7.

accorded a denial of certiorari by this Court." He then lists the following cases under the indicated headings:

<table>
<thead>
<tr>
<th>No SUBSTANTIVE EFFECT</th>
<th>DISCRETIONARY EFFECT</th>
</tr>
</thead>
<tbody>
<tr>
<td>Goodman v. Lainson, 182 F.2d 814 (1st Cir. 1951); McCarty v. O'Brien, 188 F.2d 151 (1st Cir. 1951); Soulia v. O'Brien, 188 F.2d 233 (1st Cir. 1951); Odell v. Hudspeth, 189 F.2d 300 (10th Cir. 1951); Ekberg v. McGee, 191 F.2d 625 (9th Cir. 1951) (also reported at 194 F.2d 175 (9th Cir. 1951)); Samuell v. California, 191 F.2d 721 (9th Cir. 1951); Melanson v. O'Brien, 191 F.2d 963 (1st Cir. 1951); Bacon v. Sullivan, 194 F.2d 166 (5th Cir. 1952); United States ex rel. Almeida v. Baldi, 195 F.2d 815 (3d Cir. 1952); Hawk v. Hann, 103 F. Supp. 138 (D. Neb. 1952); Ex parte Wells, 99 F. Supp. 320 (N.D. Cal. 1951); Fouquette v. Bernard, 198 F.2d 96 (9th Cir. 1952); United States ex rel. Master v. Baldi, 198 F.2d 113 (3d Cir. 1952); United States ex rel. Daverse v. Hohn, 198 F.2d 934 (3d Cir. 1952).</td>
<td>Anderson v. Eidson, 191 F.2d 989 (8th Cir. 1951); Holland v. Eidson, 90 F. Supp. 314 (W.D. Mo. 1950); Pennsylvania ex rel. Gibbs v. Ashe, 93 F. Supp. 542 (W.D. Pa. 1950); Soulia v. O'Brien, 94 F. Supp. 764 (D. Mass. 1950); Goodwin v. Smyth, 181 F.2d 498 (4th Cir. 1950); Adkins v. Smyth, 188 F.2d 452 (4th Cir. 1951); Byars v. Swenson, 192 F.2d 739 (4th Cir. 1951); Frazier v. Ellis, 196 F.2d 231 (5th Cir. 1952); Lyle v. Eidson, 197 F.2d 327 (8th Cir. 1952); United States ex rel. Skinner v. Robinson, 105 F. Supp. 153 (E.D. Ill. 1952).</td>
</tr>
</tbody>
</table>

7. Brown v. Allen, 344 U.S. 443, 489 (1953). To this statement the Justice appended the following footnote:

"In No. 20, Daniels v. Allen, after speaking of the denial of certiorari the District Judge felt it difficult to believe, 'that any impartial person would conclude in the light of the procedural history of this case that it clearly appears that petitioners were denied the substance of a fair trial.' He concluded the petitioners had had a fair trial, that the writ should be vacated 'because not available to petitioners on the procedural history, and if so, the petitioners are not entitled to discharge' since they did not substantiate their charges. Daniels v. Crawford, 99 F. Supp. 208, 213, 216. The Court of Appeals stated that it was only necessary to consider the proposition that petitioners were not entitled to the writ in view of the procedural history of the case and affirmed, saying that petitioners could not by habeas corpus circumvent the results of their failure to comply with the State procedural rules. Their allegation of peculiar hardship in only one day's default in complying with State procedural rules was before the Supreme Court in their application for certiorari 'and, proper respect for that Court requires that we assume that, if it had thought that such enforcement of the rules of court amounted to a denial of a fair hearing to men condemned to death, it would have granted certiorari either to the Supreme Court [of the State] or the trial court and would have reviewed the case. The case falls squarely, we think, within what was said by the Supreme Court in Ex parte Hawk, 321 U.S. 114, 118. . . .' Daniels v. Allen, 192 F.2d 763, 768, 769."

"In No. 22, Speller v. Allen, the District Court stated that it 'felt strongly disposed to deny the petition for writ of habeas corpus solely on the procedural history' but decided to hear evidence on the merits. After hearing evidence, the Court dismissed, 'upon the procedural history and the record in the State Courts, for the reason that habeas corpus proceeding is not available to the petitioner
In *Brown v. Allen*, Justice Frankfurter, speaking for himself and Justices Black, Douglas, Burton and Clark, explained at length the Court's difficulty in handling the many petitions for certiorari which each year jam its docket. Special attention was given to habeas corpus proceedings by state prisoners. Based on a study of the files of 126\(^8\) such cases, he pointed out the unusual difficulty of determining the issues, much less the merits thereof. "As shown there," he said, "only 13 of 126 petitions were drawn by lawyers; others, of course, may have been drawn by lawyers either in or out of prison who did not choose to sign the petition. But our experience affirms the conclusion set forth in the survey based on one test of the legal adequacy of the petitions, that in a large number of cases, the petitions must be combed through to find the issues, certainly much more so than is true of the ordinary petitions for certiorari."\(^9\)

Justice Frankfurter further emphasized the inadequacy of the records in many habeas corpus cases.

"The certified records we have in the run of certiorari cases to assist understanding are almost unknown in this field. Indeed, the number of cases in which most of the papers necessary to prove what happened in the State proceedings are not filed is striking. . . . [W]e almost never have a transcript of these proceedings to assist us in determining whether the trial is adequate. . . . [I]n less than one-fourth of the cases is more than a perfunctory order of the State courts filed."\(^10\)

He then points out that the delicacy of the relations between federal and state authority required some kind of a review by the Supreme Court of the state proceedings before an application to a federal district court for a writ of habeas corpus, but concluded that to hold a denial of certiorari to the state court the equivalent of approval of the decision would amount to a subversion of the Act of

---

10. *Id.* at 493-4.
1867,\textsuperscript{11} which defined the scope of the federal courts’ jurisdiction in habeas corpus. In conclusion, Justice Frankfurter said:\textsuperscript{12}

“The reasons why our denial of certiorari in the ordinary run of cases can be any number of things other than a decision on the merits are only multiplied by the circumstances of this class of petitions. And so we conclude that in habeas corpus cases, as in others, denial of certiorari cannot be interpreted as an ‘expression of opinion on the merits.’”

Mr. Justice Jackson, concurring with the majority in affirming the decisions below but with the minority on the meaning of certiorari, cut sharply into the fiction that the denial of certiorari is meaningless:

“But now it is proposed to neutralize the artificiality of the process and counterbalance the fiction that our certiorari is a state remedy by holding that this step which the prisoner must take means nothing to him or the state when it fails, as in most cases it does.

“The Court is not quite of one mind on the subject. Some say denial means nothing, others say it means nothing much. Realistically, the first position is untenable and the second is unintelligible. How can we say that the prisoner must present his case to us and at the same time say that what we do with it means nothing to anybody. We might conceivably take either position but not, rationally, both, for the two will not only burden our own docket and harass the state authorities but it makes a prisoner’s legitimate quest for federal justice an endurance contest.

“True, neither those outside of the Court, nor on many occasions those inside of it, know just what reasons led six Justices to withhold consent to a certiorari. But all know that a majority, larger than can be mustered for a good many decisions, has found reason for not reviewing the case here. Because no one knows all that a denial means, does it mean that it means nothing? Perhaps the profession could accept denial as meaningless before the custom was introduced of noting dissents from them. Lawyers and lower judges will not readily believe that Justices of this Court are taking the trouble to signal a meaningless division of opinion about a meaningless act. It is just one of the facts of life that today every lower court does attach importance to denials and to presence or absence of dissents from denials, as judicial opinions and lawyers’ arguments show.”\textsuperscript{13}

\textsuperscript{11} 14 STAT. 385 (1867).
\textsuperscript{12} Brown v. Allen, 344 U.S. 443, 497 (1953). The opinion of Justice Frankfurter held that there was not only no basis for holding the denial of certiorari res judicata but equally no basis for leaving the district judge free to guess whether the Court has passed on the merits. “The District Judge ordinarily knows painfully little of the painfully little we know.” \textit{Id.} at 494.
\textsuperscript{13} \textit{Id.} at 542.
Justice Jackson finds some "order in the confusion" by the distinction between the effect of a denial of certiorari as stare decisis and as res judicata. Of course, it has no significance as a precedent, he argues, because it approves no principle entitled to weight in subsequent cases. As res judicata, writing finis to a legal issue and, perhaps, a human life, it has meaning as the Rosenbergs and countless others could corroborate if they could testify from the grave. Justice Jackson's position is at variance with the understanding and practice of the profession as to the first point, and with the law as applied to habeas corpus proceedings as to the second.

A series of articles on certiorari, therefore, starts out with two strikes against it. First, there is the position of a majority of the Court that certiorari is meaningless; second, the Supreme Court seldom says anything except "certiorari denied." Occasionally it admonishes the legal world that that is all that is being said. Reasons are rarely given, and if stated are delivered with cryptic brevity as if to point up the secret. If this last is indeed its aim, it has apparently succeeded. Judging by the figures since the advent of the wholesale discretionary jurisdiction of the Court, lawyers still do not understand

14. Id. at 543.
15. Lawyers constantly cite cases as precedents, adding "certiorari denied," with the appropriate reference.
16. Justice Jackson himself recognized the difficulty involved in the principle of res judicata as applied to habeas corpus proceedings.

This last case carries the view to an extreme. The district court originally dismissed the case for want of jurisdiction. The Supreme Court denied certiorari. The case was then heard on the merits, and then once again took the hard road up to the Supreme Court. This time, the petition having been on the merits, the Court granted certiorari. It then realigned the parties, as a result found no diversity, and dismissed the case. Seven years had gone by.

See Statements in other cases to the same effect, collected in Robertson and Kirkham, Jurisdiction of the Supreme Court of the United States 603 n.3 (2d ed., Wolfson and Kurland, 1951).
19. During the 1951 term, reasons were given for denial of certiorari in four cases: twice the reason was that application was not made within the time provided by law; once, "for want of a final judgment;" and once because the judgment was based on a nonfederal ground adequate to support it. See Harper and Pratt, What the Supreme Court Did Not Do During the 1951 Term, 101 U. of Pa. L. Rev. 439, 442 (1953).

During this past term reasons for the denial of certiorari were delivered thirteen times. All cases were in forma pauperis. The reason given was always the same: the application was not made in time. This may be of some aid to convicts in prison, though it is highly doubtful. To lawyers, to be reminded that an application must be made in time can hardly be considered helpful.

the subtle handling of this technique of review. The number of cases which bombard the Court has increased in recent years.\textsuperscript{21} The number of certiorari petitions has increased also,\textsuperscript{22} retaining its dominance over the Court's business;\textsuperscript{23} but the percentage of petitions granted

\begin{table}[h]
\centering
\begin{tabular}{|c|c|c|}
\hline
Year & Cases filed & Percentage
\hline
1927 & 844 & 69\% \\
1928 & 808 & 80\% \\
1929 & 791 & 77\% \\
1930 & 893 & 81\% \\
1931 & 883 & 83\% \\
1932 & 906 & 87\% \\
1933 & 1021 & 86\% \\
1934 & 926 & 86\% \\
1935 & 986 & 90\% \\
1936 & 941 & 90\% \\
1937 & 1004 & 90\% \\
1938 & 922 & 90\% \\
1939 & 981 & 90\% \\
\hline
1940 & 977 & 90\% \\
1941 & 1178 & 90\% \\
1942 & 984 & 90\% \\
1943 & 997 & 90\% \\
1944 & 1237 & 90\% \\
1945 & 1181 & 90\% \\
1946 & 1270 & 90\% \\
1947 & 1316 & 90\% \\
1948 & 1465 & 90\% \\
1949 & 1295 & 90\% \\
1950 & 1510 & 90\% \\
1951 & 1234 & 90\% \\
1952 & 1437 & 90\% \\
\hline
\end{tabular}
\caption{Cases filed in the Supreme Court.}
\end{table}

\begin{table}[h]
\centering
\begin{tabular}{|c|c|c|c|}
\hline
Year & Petitions filed & Percentage
\hline
1927 & 587 & 69\% \\
1928 & 649 & 80\% \\
1929 & 692 & 77\% \\
1930 & 726 & 81\% \\
1931 & 738 & 83\% \\
1932 & 797 & 87\% \\
1933 & 880 & 86\% \\
1934 & 835 & 86\% \\
1935 & 865 & 90\% \\
1936 & 824 & 90\% \\
1937 & 873 & 90\% \\
1938 & 806 (117) & 86\% \\
1939 & 886 & 86\% \\
\hline
1940 & 889 (120) & 90\% \\
1941 & 962 (178) & 90\% \\
1942 & 874 (147) & 90\% \\
1943 & 914 (214) & 90\% \\
1944 & 1142 (339) & 90\% \\
1945 & 1120 (393) & 90\% \\
1946 & 1073 (426) & 90\% \\
1947 & 1134 (447) & 90\% \\
1948 & 1074 (441) & 90\% \\
1949 & 1025 (413) & 90\% \\
1950 & 1081 (441) & 90\% \\
\hline
\end{tabular}
\caption{Certiorari petitions filed.}
\end{table}

\begin{table}[h]
\centering
\begin{tabular}{|c|c|c|}
\hline
Year & Percentage & Year & Percentage
\hline
1927 & 69\% & 1940 & 90\% \\
1928 & 80\% & 1941 & 81\% \\
1929 & 77\% & 1942 & 88\% \\
1930 & 81\% & 1943 & 92\% \\
1931 & 83\% & 1944 & 92\% \\
1932 & 87\% & 1945 & 84\% \\
1933 & 86\% & 1946 & 83\% \\
1934 & 90\% & 1947 & 83\% \\
1935 & 90\% & 1948 & 77\% \\
1936 & 88\% & 1949 & 85\% \\
1937 & 86\% & 1950 & 83\% \\
1938 & 86\% & 1951 & 83\% \\
1939 & 90\% & 1952 & 75\% \\
\hline
\end{tabular}
\caption{Percentage of certiorari cases before the court.}
\end{table}

This quantitative increase is mainly the result of the increase in \textit{in forma pauperis} petitions placed in parentheses alongside the total figure.

\begin{table}[h]
\centering
\begin{tabular}{|c|c|}
\hline
Year & Cases filed
\hline
1927 & 587 \textsuperscript{21} \\
1928 & 649 \textsuperscript{21} \\
1929 & 692 \textsuperscript{21} \\
1930 & 726 \textsuperscript{21} \\
1931 & 738 \textsuperscript{21} \\
1932 & 797 \textsuperscript{21} \\
1933 & 880 \textsuperscript{21} \\
1934 & 835 \textsuperscript{21} \\
1935 & 865 \textsuperscript{21} \\
1936 & 824 \textsuperscript{21} \\
1937 & 873 \textsuperscript{21} \\
1938 & 806 \textsuperscript{21} \\
1939 & 886 \textsuperscript{21} \\
\hline
1940 & 889 (120) \textsuperscript{21} \\
1941 & 962 (178) \textsuperscript{21} \\
1942 & 874 (147) \textsuperscript{21} \\
1943 & 914 (214) \textsuperscript{21} \\
1944 & 1142 (339) \textsuperscript{21} \\
1945 & 1120 (393) \textsuperscript{21} \\
1946 & 1073 (426) \textsuperscript{21} \\
1947 & 1134 (447) \textsuperscript{21} \\
1948 & 1074 (441) \textsuperscript{21} \\
1949 & 1025 (413) \textsuperscript{21} \\
1950 & 1081 (441) \textsuperscript{21} \\
\hline
\end{tabular}
\caption{Certiorari petitions filed.}
\end{table}

The percentages in this and the following footnote are based upon:

\begin{itemize}
\item For the years 1927-1938—\textit{Articles on the annual business of the Supreme Court in \textit{Harv. L. Rev.} (1928-1940).}
\item For the years 1939-1951—\textit{Director of the Administrative Office of the United States Courts, \textit{Ann. Rep.} table A 1 (1942-1952).}
\end{itemize}
has shown no similar increase. When this expansion of the certiorari jurisdiction is coupled with the discretionary method of handling appeals—per curiam adjudication on the merits either by a dismissal for insubstantiality or affirmation or reversal—practically the entire work of the Court is included. Thus, making known the criteria of review is a matter of concern.

Nevertheless, the Court has thrown little light on the subject. This has material consequences. A welter of cases means hurried decisions. This is not solved by the denial of review in many cases, in order that those cases that are decided can be decided more carefully. Such a procedure presumes a careful selection of cases for decision. Time is needed to consider whether or not to review. Justice Frankfurter has commented:

“If the Court is limited in the number of cases it can decide, no less is it limited in the number it can decide not to decide.”

“. . . Such a mass of petitions with their accompanying records and briefs gives rise to a feeling of oppression that is peculiarly hostile to the serenity and leisure indispensable to the best judicial work. Not only does it affect the ‘mental climate’

24. Percentage of certiorari petitions granted review:

<table>
<thead>
<tr>
<th>Year</th>
<th>Percentage</th>
</tr>
</thead>
<tbody>
<tr>
<td>1927</td>
<td>14%</td>
</tr>
<tr>
<td>1928</td>
<td>15%</td>
</tr>
<tr>
<td>1929</td>
<td>19%</td>
</tr>
<tr>
<td>1930</td>
<td>21%</td>
</tr>
<tr>
<td>1931</td>
<td>18.5%</td>
</tr>
<tr>
<td>1932</td>
<td>18.5%</td>
</tr>
<tr>
<td>1933</td>
<td>16.8%</td>
</tr>
<tr>
<td>1934</td>
<td>20%</td>
</tr>
<tr>
<td>1935</td>
<td>17.2%</td>
</tr>
<tr>
<td>1936</td>
<td>18.6%</td>
</tr>
<tr>
<td>1937</td>
<td>17.7%</td>
</tr>
<tr>
<td>1938</td>
<td>16%</td>
</tr>
<tr>
<td>1939</td>
<td>22.3%</td>
</tr>
</tbody>
</table>


26. For the similarity of this type of adjudication to certiorari and for the problems of the per curiam decision, see Harper and Pratt, What the Supreme Court Did Not Do During the 1951 Term, 101 U. of Pa. L. Rev. 439, 446-51 (1953). On the frequency of this method of decision, see id. at 450, and infra at Appendix Tables II and III.


28. The only cases that would appear to escape this are the few that are within the original jurisdiction of the Court. These constitute an infinitesimal part of the Court’s work each term. During the past three terms, the Court decided five cases originating on the original docket. See Appendix Table III infra.

29. In NLRB v. Mexia Textile Mills, Inc., 339 U.S. 563, 570-6 (1950), Frankfurter, dissenting to the granting of certiorari, noted the consequences of granting review to the wrong cases as the following: (1) Has a bad psychological effect on the court of appeals; (2) Causes a waste of time which diverts the Court from other matters; and (3) Encourages hundreds of petitions which do not belong before the Court.

in which the Court moves. It is bound to affect its sureness of judgment upon these certioraris. Considering the speed with which petitions must be disposed of, increase in numbers increases the margin of error. . . . Plainly, the Court is operating under a stringent policy. But the circumstances under which it is employed—the pressure of the Court's business—make extremely difficult the application of the Court's avowed criteria. . . .”

The problem, then may be for the Court to crack down on the number of petitions coming before it. This can only be done by convincing a substantial number of losing attorneys that there is no sense in “taking this case right up to the United States Supreme Court;” but to make an attorney with a bothersome client admit this, the position of the Court must be made clear indeed.

Frankfurter and Hart, writing in 1934 on the Supreme Court, suggested that penalties for frivolous appeals be imposed; but although there are precedents and statutory authority for this, it is not now used. They also suggested the use of a system of substantial costs, similar to that of the English, to discourage unmerited applications. But the value of this system depends in large measure on the ability of the attorney to judge beforehand how meritorious the case is.

Their other suggestion appears to be more valuable. It is for the Court to give reasons for the grant of certiorari in the course of writing its opinion. While this has in some measure been followed, unfortunately the value of these statements has been diminished by their vagueness. However, it is not adequate even if it were fol-

   Some idea of the pressure can be gained by the quotations and commentary in Stern and Gressman, Supreme Court Practice 126-7 (1950).
32. Frankfurter and Hart, The Business of the Supreme Court at October Term, 1933, 48 Harv. L. Rev. 238, 244 (1934).
35. Frankfurter and Hart, The Business of the Supreme Court at October Term, 1933, 48 Harv. L. Rev. 238, 244 (1934).
36. In 1935, of 103 opinions, 52 gave the reason for the granting of certiorari; in 1936, of 106 opinions, 49 gave the reason for the granting of the writ. Frankfurter and Fisher, The Business of the Supreme Court at the October Term, 1935 and 1936, 51 Harv. L. Rev. 577, 598 (1938). In 1948, of 97 cases decided by full opinions, 58 gave reasons. Note, The Supreme Court, 1948 Term, 63 Harv. L. Rev. 119, 120 n.11 (1949). In 1949, 62 of 76 opinions gave reasons for granting certiorari. Note, The Supreme Court, 1949 Term, 64 Harv. L. Rev. 158 (1950). This past term, however, in only 35 of the 92 opinions were explicit reasons given.
37. For example out of the 58 cases in which reasons were stated, 22 of the 58 merely stated without elaborating that the case was “important.” Note, The Supreme Court, 1948 Term, 63 Harv. L. Rev. 119, 120 n.11 (1949).
lowed more fully. There are certain types of cases in which certiorari should not be granted. These cannot be determined by an examination of the reasons for granting the writ in proper cases. The hope that breathes eternal in a losing client will require more than a negative pregnant to stop his asking the Court for review. Further, the Court may not always be justified in granting certiorari; at least in the opinion of some Justices. There are numerous instances in which certiorari has been dismissed as improvidently granted, and even in cases which were heard, Justice Frankfurter has sometimes stated his dissent thereto.

Professor Louis Jaffe, in dealing with the problem of getting some certainty into this field, suggested three other alternatives: (1) reintroducing appeals in certain areas; (2) “attempting the rather futile task of further refinement of standards for the grant of the writ;” and (3) requiring reasons for refusal when one or more of the Justices dissent.

The first alternative begs the question to some extent, since if the Court could agree on which areas, it might be equally easy to follow a discernible pattern in granting certiorari. Furthermore, it is not in point here, though this is no fault of Professor Jaffe, since the adoption of the proposal would not result in the lightening of the Court's burden unless a corresponding elimination of appeals in certain areas is instituted. A determination of which areas leads to Professor Jaffe's second alternative.

This alternative is dismissed in the process of stating it by calling the idea "futile." The third is presented as the most feasible. It is not an adequate solution, however, since frequently the disagreement is over importance and in the absence of prior standards of importance, this might not be very helpful. Various Justices have subject matter and issue prejudices, which are already well-known, and there would seem to be little to be gained except to bring these disagreements into the open. But the idea has merit insofar as it should encourage the statement of opinion when it becomes apparent to the Court that many cases on a particular matter have no chance of

38. "... when comparison is made between the issues at stake in petitions that have been granted and those in which petitions have been denied, the contrast is at times glaring." NLRB v. Mexia Textile Mills, Inc., 339 U.S. 563, 573 (1950) (dissenting opinion by Justice Frankfurter).

39. This happened to three cases this past term.


success. This has been done, but infrequently. For example, in Gaines v. Washington, Justice Taft wrote: "It has not been the practice of the Court to write opinions and state its reasons for denying writs of certiorari, and this opinion is not to be regarded as indicating an intention to adopt that practice, but in view of the fact that the Court has deemed it wise to initiate a practice for speedily disposing of criminal cases in which there is no real basis for jurisdiction in this Court, it was thought proper to make an exception here, not to be repeated, and write an opinion." Despite the apologetic language, it would appear to be better for everyone concerned if this practice were more frequently used—to advise the profession officially, rather than in an unofficial or nonjudicial way when a broad agreement of this type is reached.

Notwithstanding the conclusion of Professor Jaffe that a refinement of standards is futile, it is proposed here to analyze Supreme Court Rule 38—and suggest possible changes to make it more effective in its application. It is not thought that by these or any other refinements an attorney in every instance will know whether his case will be reviewed. It is hoped, however, by these proposals, in a significant number of instances to provide solutions, avoid bad answers, and in general improve the existing situation.

There are six guides theoretically used at the present time though none of these according to the specific language of the Rules is individually, or combined with others, completely controlling or limiting: (1) Where a state court has decided a federal question not yet decided by the United States Supreme Court or has decided a case in a way probably not in accord with the Supreme Court. (2) Conflict in the circuits. (3) Where a circuit court decides a

42. The Court's unwillingness to state reasons has been expressed many times, e.g., by Justice Frankfurter in Maryland v. Baltimore Radio Show, Inc., 338 U.S. 912, 918 (1950); Bondholders, Inc. v. Powell, 342 U.S. 921 (1952); and Chemical Bank and Trust Co. v. Group of Institutional Investors, 343 U.S. 982 (1952). See also relevant excerpts quoted in Harper and Pratt, What the Supreme Court Did Not Do During the 1951 Term, 101 U. of Pa. L. Rev. 439, 441, 442 (1953).

43. 277 U.S. 81, 87 (1928).

44. See also In re Woods, 143 U.S. 202 (1892); Smith v. Vulcan Iron Works, 165 U.S. 518 (1897); Department of Banking v. Pink, 317 U.S. 264 (1942).


47. These are paraphrases of the more long-winded language of U.S. Sup. Ct. Rule 38.
point of local law in conflict with local decisions. (4) Where the
circuit courts decide an important question not yet decided by the
Supreme Court. (5) When circuit courts decide a federal question
in a way probably in conflict with the decisions of the Supreme Court.
(6) When a circuit court has sanctioned another court to vary from
the usual course of judicial proceedings.

Before discussing each one of these separately, it should be noted
that all six of these criteria cut across subject matter or issue and
concern themselves, in one way or another, with the merits of the
decision of the case.48 Yet, for some reason, merit has been one of
the standards specifically rejected by the Justices when they discuss the
reasons for granting or denying certiorari. "Our rules adopted to
carry out the policy of the statutes granting the power to bring cases
here by certiorari have apprised the Bar and the public that we will
not take cases fully heard and adjudicated below for the mere purpose
of reexamining the correctness of the result."49 Yet an attorney, on
looking at the criteria set up by the rules, can assume that if his
case was wrongly decided he might have a case to merit certiorari.
In view of these criteria, it is not unreasonable to assume that if
certiorari is denied, the inference may be drawn that the case is
affirmed.50 Repeated denials of certiorari may logically have this
meaning if one takes the rule at face value.51 Judging from the major-
ity of the briefs for certiorari, this has been recognized by many prac-
ticing attorneys. How, then, can the Court52 say one thing when
the rule appears to state something else. The answer is that there
has been interpretation, for the most part silent, which has made cer-
tain criteria crucial, others valueless; and has resulted in certain words
being emphasized, others frequently ignored. What facts and figures
there are bear this out.

48. In the rare case when the Court does not have a quorum of six qualified
Justices [see 28 U.S.C. §1 (Supp. 1949)], it appears that if a majority of those
qualified note that the case should not be heard at the next term of the Court, the
judgment of the court below is affirmed. 28 U.S.C. §2109 (Supp. 1949). See


50. This inference is not compelled since there may have been too many cases
presented and thus some worthy cases rejected.

51. Moore and Oglebay give this interpretation to the meaning of certiorari.
Moore and Oglebay, The Supreme Court, Stare Decisis and Law of the Case, 21
Texas L. Rev. 514, 533 (1943).

52. The quotation above is, of course, not just the view of Justice Roberts but
the generally accepted position.

See Magnum Import Co. v. Coty, 262 U.S. 159, 163 (1923), cited as the rule
in Robertson and Kirkham, Jurisdiction of the Supreme Court of the United
States 588 n.8 (2d ed., Wolfson and Kurland, 1951); Vinson, Work of the U.S.
Supreme Court, 12 Texas B.J. 551-2 (1949).
First Criterion

Where a state court has decided a question of substance not yet decided by the United States Supreme Court or has decided a case in a way probably not in accord with the Supreme Court:—Certiorari to state courts generally has been restricted. The figures for the past four years show over a four to one ratio of certiorari writs issued to federal courts to those granted to state courts. This is in comparison to a five to four ratio of petitions for certiorari to federal courts to petitions for writs to state courts. Of writs issued to state courts, the figures show a two to one ratio of reversals to affirmances, pointing to a strong accent on merit as the determinant in the granting of the writ. This is further emphasized in an interesting dissenting opinion to the denial of certiorari recorded by Justices Black and Douglas this past term. Following the record of denial of certiorari to Du. Bois v. Mossey is the following: "Mr. Justice Black and Mr. Justice Douglas would grant certiorari and reverse the judgment on grounds that petitioners have been denied a trial by jury which the Seventh Amendment to the Constitution is intended to guarantee." Similarly, the same Justices in a memorandum opinion dissenting from the denial of certiorari in Isserman v. Ethics Committee after stating the question involved, said,

53. See Table A infra. This ratio is the end-product of a trend begun in 1924 and made noticeable and commented upon in Frankfurter and Landis, The Business of the Supreme Court at October Term, 1930, 45 Harv. L. Rev. 271, 296 n.41 (1931).

54. 

<table>
<thead>
<tr>
<th></th>
<th>1947</th>
<th>1948</th>
<th>1949</th>
<th>1950</th>
<th>1951</th>
<th>1952</th>
</tr>
</thead>
<tbody>
<tr>
<td>Total certiorari petitions denied</td>
<td>955</td>
<td>948</td>
<td>991</td>
<td>881</td>
<td>904</td>
<td></td>
</tr>
<tr>
<td>Total certiorari petitions granted</td>
<td>97</td>
<td>144</td>
<td>85</td>
<td>89</td>
<td>86</td>
<td></td>
</tr>
<tr>
<td>Total certiorari petitions filed</td>
<td>1052</td>
<td>1092</td>
<td>1076</td>
<td>970</td>
<td>990</td>
<td></td>
</tr>
<tr>
<td>Total filed from federal courts</td>
<td>614</td>
<td>597</td>
<td>630</td>
<td>600</td>
<td>592</td>
<td></td>
</tr>
<tr>
<td>Total filed from state courts</td>
<td>438</td>
<td>495</td>
<td>446</td>
<td>370</td>
<td>398</td>
<td></td>
</tr>
<tr>
<td>Ratio filed from state courts to those filed from federal courts</td>
<td>4.2:5.8</td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
</tbody>
</table>

55. See Table A infra.

56. 344 U.S. 869 (1952).

57. See also Borich v. Ancich, 191 F.2d 392 (9th Cir. 1951), cert. denied, 342 U.S. 905 (1952) where Justice Black noted his dissent with the statement that he would reverse the judgment below.


This case had been discussed by an order to Isserman directing him to show cause why he should not be disbarred before the United States Supreme Court. In re Isserman, 345 U.S. 286 (1953). By such proceeding, however the court would appear to shift the burden of proof.
"... The record of the New Jersey proceedings before us leaves me with the belief that the state failed to afford petitioner the kind of a hearing required by the Due Process Clause of the Fourteenth Amendment. Although petitioner was allowed to appear before a local bar committee and to present a formal answer and make formal arguments before the State Supreme Court, the full record persuades me that he was denied an adequate opportunity to confront witnesses against him and to offer evidence in his behalf. Instead of hearing evidence and making its own findings the state court's order was based on findings made by a federal district judge who had summarily convicted petitioners of contempt without a hearing. I believe that a lawyer is denied due process when he is expelled from his profession without ever having been afforded an opportunity to confront his accusers and to present evidence to deny, explain or extenuate the charges against him. See Ex Parte Robertson, 19 Wall. 505, 512-513, and In re Oliver, 333 U.S. 257."

Mr. Edwin McElwain speaks in a like vein of Justice Hughes' practices granting certiorari: 59 "... occasionally he would recommend the grant of certiorari in a case of no public importance whatever simply because the decision below was unjust, unreasonable, or plainly wrong." 60

Another point which has become a major focus for the Court in applying this criterion is the implication of the phrase "question of substance." Of the three cases, this past term which the Court specifically stated were granted on this criterion, all mentioned "question of substance" as being the determinant. But the significance of this phrase is not so much in the granting of certiorari as in the handling of appeals from the state courts. 61 The two problems are similar. 62 Though Rule 12 applies to appeals from both federal 63 and state courts, 64 it is appeals from state courts which were intended to be cut off and against which the rule has been most extensively

60. The late Chief Justice Vinson's clerks have noted in private talks his practice of asking for the names of the judges who decided the case below, in the preparation of the memorandum of a petition for certiorari. Presumably this had little purpose except insofar as it might bear on whether the case was correctly and reasonably decided.
62. They are not identical in effect, however. Appeals dismissed are adjudications on the merits and may be cited as decisions of the Supreme Court; thus, in Minersville School District v. Gobitis, 310 U.S. 586 (1940) the Supreme Court granted certiorari because of the conflict between the circuit court decision and previous per curiam dismissals. Certiorari, is, of course, theoretically unrelated to the merits of the case.
used.\(^{65}\) Once again, the proportion of dismissal of appeals remains constant \(^{66}\) and high despite the length of time in which the device has been in existence, the bar apparently being unable to fathom the mysterious factors which make a case insubstantial. As can be seen from the table in the note,\(^{97}\) "insubstantiality" is the hurdle over which most appeals fall.\(^{68}\) This insubstantiality often carries over to be the determinant of dismissal for want of jurisdiction \(^{69}\) and even to a

65. Frankfurter and Hart, The Business of the Supreme Court at October Term, 1932, 47 Harv. L. Rev. 245, 262 (1933). They cite the following figures: 179 out of 510 appeals failed to make the requisite proof of jurisdiction. All but 20 of these were from state courts. See note 66 infra.

66. Appeals from state courts:

<table>
<thead>
<tr>
<th>Year</th>
<th>Total Appeals</th>
<th>Appeals from State Alone</th>
<th>Total Dismissed</th>
<th>Dismissed from State Courts</th>
</tr>
</thead>
<tbody>
<tr>
<td>1929</td>
<td>101</td>
<td>68</td>
<td>50</td>
<td>41</td>
</tr>
<tr>
<td>1930</td>
<td>115</td>
<td>71</td>
<td>50</td>
<td>44</td>
</tr>
<tr>
<td>1931</td>
<td>113</td>
<td>63</td>
<td>55</td>
<td>51</td>
</tr>
<tr>
<td>1932</td>
<td>95</td>
<td>53</td>
<td>53</td>
<td>38</td>
</tr>
<tr>
<td>1933</td>
<td>128</td>
<td>86</td>
<td>58</td>
<td>52</td>
</tr>
<tr>
<td>1934</td>
<td>85</td>
<td>56</td>
<td>41</td>
<td>68</td>
</tr>
<tr>
<td>1936</td>
<td>114</td>
<td>85</td>
<td>54</td>
<td>52</td>
</tr>
<tr>
<td>1937</td>
<td>112</td>
<td>72</td>
<td>65</td>
<td>51</td>
</tr>
<tr>
<td>1938</td>
<td>102</td>
<td>63</td>
<td>41</td>
<td>37</td>
</tr>
<tr>
<td>1948</td>
<td>82</td>
<td>58</td>
<td>45</td>
<td>40</td>
</tr>
<tr>
<td>1949</td>
<td>92</td>
<td>50</td>
<td>40</td>
<td>37</td>
</tr>
<tr>
<td>1950</td>
<td>78</td>
<td>49</td>
<td>35</td>
<td>33</td>
</tr>
<tr>
<td>1951</td>
<td>101</td>
<td>52</td>
<td>50</td>
<td>42</td>
</tr>
<tr>
<td>1952</td>
<td>87</td>
<td>38</td>
<td>37</td>
<td>27</td>
</tr>
</tbody>
</table>

Figures for 1929-37 based on the articles on the annual business of the Supreme Court in Harv. L. Rev. (1930-1940).

Figures for 1948-1951 are based on the articles on the annual business of the Supreme Court in Harv. L. Rev. (1949-1952). These figures are at slight variance with the total appeals listed in the official figures and those used previously in this series, but since they include sources, they have been used here.

67.

<table>
<thead>
<tr>
<th>Year</th>
<th>Total Dismissed</th>
<th>Want of Subst. Fed. Quest.</th>
<th>Want of Juris.</th>
<th>Motion of Appellant</th>
<th>Misc.</th>
<th>No Ground Stated</th>
</tr>
</thead>
<tbody>
<tr>
<td>1948</td>
<td>40</td>
<td>26</td>
<td>7</td>
<td>2</td>
<td>5</td>
<td>5</td>
</tr>
<tr>
<td>1949</td>
<td>40</td>
<td>21</td>
<td>11</td>
<td>0</td>
<td>2</td>
<td>3</td>
</tr>
<tr>
<td>1950</td>
<td>35</td>
<td>26</td>
<td>2</td>
<td>2</td>
<td>3</td>
<td>2</td>
</tr>
<tr>
<td>1951</td>
<td>50</td>
<td>37</td>
<td>5</td>
<td>2</td>
<td>4</td>
<td>2</td>
</tr>
<tr>
<td>1952</td>
<td>37</td>
<td>27</td>
<td>5</td>
<td>0</td>
<td>4</td>
<td>0</td>
</tr>
</tbody>
</table>

Figures for the above are based on Notes on the Supreme Court in Harv. L. Rev. (1949-1953).

68. Besides the figures given above, Ulman and Spears writing in 1940, stated that in the decade up to that time over 400 appeals had been dismissed on the grounds of no substantial federal question being presented. Ulman and Spears, "Dismissed for Want of a Substantial Federal Question," 20 B.U.L. Rev. 501, 503 (1940).

69. "The distinction between an appeal affirmed in the jurisdictional statement and one dismissed for want of a substantial federal question is obscure. Both involve an adjudication that the claim asserted is without merit. In the latter case, supposedly, the lack of merit is so plain as to amount to a want of jurisdiction; in the former it is sufficient to furnish jurisdiction, although insufficient to justify presentation on briefs with oral argument." Frankfurter and Hart, The Business of the Supreme Court at October Term, 1933, 48 Harv. L. Rev. 238, 246 n.20 (1934).

"No such distinction obtains in the treatment of district court appeals. The requirement of a showing of substantiality is now dispensed with under the rules. . . . An appeal in which the questions involved are 'so substantial as not
per curiam affirmation. Thus, the need for a guide to substantiality becomes all the more pressing.

It has often been noted how comparatively infrequent are reversals in appeals from state courts. Of the appeals which are not dismissed the relation between affirmances and reversals is interesting. Curiously the results are almost in exact contradiction to the certiorari cases where merit seems to be of importance. Here again, the Court usually refuses to give reasons. Usually no case or statute is cited. In others, one or two cases may be cited; more than this number is unusual. Furthermore, the cases cited are frequently stock precedents affirming the right of the Court to treat an appeal summarily, rather than going to the point in issue. But even when the cases are on the issue, the effect of such dismissals is not such as to prevent further petitions. It is recognized that not all appeals can be given a full hearing and be disposed of by opinion. The short-cut method is essential as in certiorari. The solution then, is to determine standards of substance which not only can be applied by the Court but which can be recognized by the profession.

SECOND CRITERION

Conflict in circuits:—Of the six standards in Rule 38, this is the one most frequently mentioned by the Court in granting review. Frank-
furter and Hart writing on the 1927-32 terms stated that it appeared to be the reason for the grant of certiorari in more than half of the cases which they studied.\textsuperscript{75} In subsequent articles the following figures are cited: In 24 cases plus 8 companion cases out of 45 cases where reason for review was given, conflict of circuits was stated to be the reason for review; \textsuperscript{76} 20 out of 39; \textsuperscript{77} and 15 out of 45.\textsuperscript{78} This past term, of the 35 cases in which a reason was stated for the granting of review, conflict in circuits accounted for 14. These figures appear so significant \textsuperscript{79} that one might legitimately infer that it is normally a sufficient condition—controlling despite the preamble to Rule 38—to compel review. Modern text writers on the Supreme Court jurisdiction seem convinced of this. Thus, Stern and Gressman say, “The Supreme Court will usually grant certiorari where the decision of the federal court of appeals, as to which review is sought, is in direct conflict with a decision of another court of appeals on the same matter of federal law or on the same matter of general law as to which federal courts can exercise independent judgments. . . . the Court does not feel itself very free to deny review in the face of a square and irreconcilable conflict . . .” \textsuperscript{80} Robertson and Kirkham state the rule even more strongly: “Where the decision of the Court of Appeals sought to be reviewed by certiorari directly conflicts, upon a question of federal law,\textsuperscript{81} with the decision of another Court of Appeals on the same question, the Supreme Court grants certiorari as of course, and irrespective of the importance of the question of law involved.” \textsuperscript{82} Lawyers, too, seem to follow this theory. In almost every brief for certiorari, there is an effort to find a conflict in circuits. And as far as the possibilities of telling when there is a direct conflict we are

\textsuperscript{75} Frankfurter and Hart, \textit{The Business of the Supreme Court at October Term, 1933}, 48 Harv. L. Rev. 238, 267 n.72 (1934).

\textsuperscript{76} Frankfurter and Hart, \textit{The Business of the Supreme Court at October Term, 1934}, 49 Harv. L. Rev. 68, 86 n.38 (1935).

\textsuperscript{77} Frankfurter and Fisher, \textit{The Business of the Supreme Court at the October Terms, 1935 and 1936}, 51 Harv. L. Rev. 577, 595 n.32 (1938).

\textsuperscript{78} Ibid.

\textsuperscript{79} See also ROBERTSON AND KIRKHAM, \textit{JURISDICTION OF THE SUPREME COURT OF THE UNITED STATES} 632 n.10 \textit{et seq.} (2d ed., Wolfson and Kurland, 1951).

\textsuperscript{80} STEIN AND GRESSMAN, \textit{SUPREME COURT PRACTICE} 101 (1st ed. 1950). The qualification is in cases where the conflict is with a decision which is discredited by reason of intervening decisions of the Supreme Court or other courts of appeal or with a decision which is obsolete.

\textsuperscript{81} Ruhlin v. New York Life Ins. Co., 304 U.S. 202, 206 (1938). In which the Court said: “As to questions controlled by state law, however, conflict among the circuits is not of itself a reason for granting a writ of certiorari. The conflict may be merely corollary to a permissible difference of opinion in the state courts.”

An inference might be drawn from this that where federal law is concerned conflict in the circuits is a sufficient condition to require the granting of the writ.

\textsuperscript{82} ROBERTSON AND KIRKHAM, \textit{op. cit. supra} note 78, at 629.
told that "for skilled lawyers, the issue of conflict, in the great majority of cases, comes close to mechanical determination." 83

Such a simple rule would be welcome; at least one instance of clarity amidst confusion. Unfortunately, it doesn't work out that way. Each year there are many cases which arise where a conflict in circuits exists but no writ is issued. Conflict in an important case is what is necessary, although Rule 38 does not say so.

Many commentators have given evidence that conflict is not the ticket to the Supreme Court. As early as 1933 Frankfurter and Hart questioned it, and pointed to "importance" as being significant, citing cases of conflict where no writ was granted, presumably because the issue in dispute was a minor and technical one. 84 More recently the list of such denials has grown. Mr. Stern, in a recent article, 85 admitting the rashness of the generalization in his treatise, has cited seven further cases 86 of admitted conflicts; and this series of articles has pointed out similar cases 87 of denial despite the conflict. If these alone are not sufficient to eliminate the possibility of a mechanical operation of certiorari, statements of the Court itself lend further weight. First, there is the tendency of the Court to stretch the concept in cases where certiorari has been granted; the writ is granted on an "asserted conflict in prin-

84. Frankfurter and Hart, The Business of the Supreme Court at the October Term, 1933, 48 Harv. L. Rev. 238, 268 n.73 (1934): "... the Court denied certiorari, [on a question of the sufficiency of an indictment] despite the admission of conflict by the Government, where the only effect of lack of uniformity was to require district attorneys in certain circuits, in drafting indictments, to add a few words not elsewhere necessary," citing Carnahan v. United States, 281 U.S. 723 (1930); Capo v. United States, 281 U.S. 769 (1930); Malinow v. United States, 282 U.S. 875 (1930).

In addition to United States v. Abrams, cited by Stern, supra note 86, in the following cases this term, certiorari was denied despite the existence of a conflict: Aeration Processes, Inc. v. Lange, 196 F.2d 981 (8th Cir. 1951), cert. denied, 344 U.S. 834 (1952); Kobe, Inc. v. Dempsey Pump Co., 198 F.2d 416 (10th Cir.), cert. denied, 344 U.S. 837 (1952); Massachusetts Mutual Life Ins. Co. v. Smith, 194 F.2d 1006 (5th Cir.), cert. denied, 344 U.S. 823 (1952).
ciple," 88 a "seeming conflict," 89 "statements made . . . which seemed to conflict with the conclusion below," 90 and an "alleged conflict" 91 in which the case alleged to be in conflict is not discussed at all. In these cases "conflict" seems to be a pseudonym for importance. Then there are cases where certiorari is granted because of conflict and then, as if this is not enough, because of their importance also. 92 This bi-lateral reason was given in three of the 14 writs granted on this point in the past term. The safe 93 conclusion seems to be that a gloss had been placed on a "conflict of circuits" so that it is fading into the "importance" of the issue.

THIRD CRITERION

Where a circuit court decides a point of local law in conflict with local decisions:—This standard seems almost valueless; judging from the few available statistics, it is rarely applied. In the Thirties, Frankfurter and Hart said that there were "few" cases on this issue; 94 that it was of "little importance" since rarely cited by the Court as a reason 95 for review. In 1935 and 1936 of 39 and 45 cases respectively for which reasons were given for the granting of certiorari, this reason was mentioned once each term. 96 This past term it was not stated at all as a reason for granting review. Under Erie v. Tompkins, 97 the question usually is whether the federal or

92. New York v. Saper, 336 U.S. 328 (1949); Oklahoma Press Publ. Co. v. Walling, 327 U.S. 186 (1945); Porter v. Warner Holding Co., 328 U.S. 395 (1946); NLRB v. A. J. Tower Co., 329 U.S. 324 (1946); NLRB v. Jones & Laughlin Steel Corp., 331 U.S. 416 (1947); United Brotherhood of Carpenters & Joiners v. United States, 330 U.S. 395 (1947). But in Layne & Bowler Corp. v. Western Well Works, 261 U.S. 387, 393 (1923) the Court spoke as if there were only two standards for certiorari and that they were mutually exclusive and sufficient to gain review: "... it is very important that we be consistent in not granting the writ of certiorari except in cases involving principles the settlement of which is of importance to the public as distinguished from that of the parties, and in cases where there is a real and embarrassing conflict of opinion and authority between the circuit courts of appeal. The present case comes under neither head."
93. Apparently not so safe. Despite this evidence a recent article in The University of Chicago Law Review takes the position that a conflict will compel certiorari, distinguishing Stern's listings on the grounds that they were not direct, narrow conflicts. Roehner and Roehner, Certiorari, What is a Conflict between Circuits?, 20 U. of CHI. L. Rev. 656 (1953).
97. 304 U.S. 64 (1938).
state law applies, rather than what the local law is. These cases are diversity cases—at least where this argument becomes the sole basis for certiorari. In 1950, one diversity case was heard; in 1951, two, and this past term only one of 52 petitions was granted. Of these four, only one—the 1950 case—might conceivably have gained review on this ground.

FOURTH CRITERION

Where the circuit court decides an important question not yet decided by the Supreme Court:—Once the mystifying and blanketing word “important” comes into play, the possibility for the use of the criterion expands also. Frankfurter and Hart found some 8 or 9 cases reviewed on this ground in 1933. In 1935, 15 were found to have been reviewed on this ground; in 1936, 25. This past term it was the stated reason 16 out of 35 times. One of the interesting observations made by the authors was the subject matter preference implicitly followed by the Court in the application of this standard—with patent cases almost never being reviewed, except where there was a conflict in the circuits.

FIFTH CRITERION

Where the circuit court decides a federal question in a way probably in conflict with applicable decisions of the Supreme Court:—

98. Robertson and Kirkham, op. cit. supra note 78, at 648. They cite no comparative figures for the statement but do give many of the cases decided under Erie v. Tompkins as evidence.


101. This figure excludes all cases in which any federal question or constitutional argument was raised in the petition. Since frequently a perfunctory constitutional argument is raised to dress up the case (e.g., the decision below for the plaintiff being so far against the weight of the evidence results in a taking without due process of law) if one were to eliminate review of diversity cases the number of petitions to be eliminated would undoubtedly be close to 70.

102. Some four cases—although probably more—were taken in 1948 based on 63 Harv. L. Rev. 119, 125-7 (1950). None of these involved the application of this standard, however. The three arising under the application of Erie v. Tompkins were questions of whether federal or state law applied; the other raising constitutional issues.

103. The table is ambiguous on this point, it does eliminate a constitutional issue.

104. Frankfurter and Hart, The Business of the Supreme Court at October Term, 1933, 48 Harv. L. Rev. 238, 272 n.84 (1934).


106. Ibid.

107. If one includes also the three cases in which it is combined as a reason with conflict in circuits and once when combined with a Supreme Court decision, the figure reaches 20, over one half of the cases in which reasons were given.

108. Frankfurter and Hart, supra note 104, at 271.
To a large extent this overlaps with the problem of the conflict in circuits; the two are frequently mentioned together.\textsuperscript{109} It is, however, often used alone, in 1933 having been explicitly mentioned six times;\textsuperscript{110} in 1934, nine times;\textsuperscript{111} in 1935, three;\textsuperscript{112} in 1936, four;\textsuperscript{113} in 1952, twice, once combined with "importance."\textsuperscript{114} Perhaps because of the injection of this latter, Frankfurter and Hart stated that it was difficult to know when certiorari would be granted.\textsuperscript{115} The difficulty, of course, is whether the facts of the later case are so different as to make the earlier Supreme Court action inapplicable.\textsuperscript{116}

\textbf{SIXTH CRITERION}

\textit{When a circuit court has departed itself or sanctioned another court to vary from the usual course of judicial proceedings:}—There is little to say concerning this except that it is just not used—at least no one has shown its explicit application by the Supreme Court. Frankfurter and Hart\textsuperscript{117} found no case where it was used; and it was completely absent as a stated reason during this past term.

The conclusion to be drawn from this description of the operation of Rule 38 in practice is this. That actually the rule has only two standards at most: the "substance" or "importance" of the question presented, and conflict in circuits. That the second to a large extent has also become a matter of "importance" seems clear. The word "important" is undefined, the Court seldom giving concrete meaning to the phrase which actually is crucial to petitioning lawyers. However, informed guesses may be made.

From the discussion above and the table below,\textsuperscript{118} one element of importance in the Court's view can safely be said to be the merit of the decision below. In short, as Mr. Micawber would say, "who won?" This is despite the frequent admonition of the Court to the contrary, but quite in accord with the real thrust of Rule 38. It also seems to be recognized by attorneys who regularly argue in their

\textsuperscript{109} Id. at 272 n.86 (cites 11 cases for the year 1933 when two were mentioned together).

\textsuperscript{110} Id. at 272 n.85.

\textsuperscript{111} Frankfurter and Hart, \textit{The Business of the Supreme Court at October Term, 1934}, 49 HARV. L. REV. 68, 87 n.39 (1935).

\textsuperscript{112} Frankfurter and Fisher, \textit{The Business of the Supreme Court at the October Terms, 1935 and 1936}, 51 HARV. L. REV. 577, 595 n.32 (1938).

\textsuperscript{113} Ibid.

\textsuperscript{114} This raises the same questions as were considered under conflict of circuits, \textit{supra}. Here a solution is less pressing since this reason is urged infrequently.

\textsuperscript{115} Frankfurter and Hart, \textit{supra} note 104, at 273.

\textsuperscript{116} Ibid.

\textsuperscript{117} Id. at 274; Frankfurter and Hart, \textit{supra} note 111, at 83 n.37.

\textsuperscript{118} Table A \textit{infra}.
briefs the unjustness or justness of the decision below.\textsuperscript{119} Strangely enough, the emphasis on merit occurs with a strange twist in the case of appeals.\textsuperscript{120} Of those not dismissed 63\% are affirmed and 37\% are reversed, the exact opposite from certiorari. This may be explained by the fact that there seems to be a feeling of need for maintaining the delicate balance between the state and the federal courts and therefore of a reluctance to reverse state action. Also in appeals from the federal courts—most of which are from three judge district courts—the issue of substantiality has already been argued out. This may not only account for the less frequent dismissal of federal appeals, but also, for less stress on merit, because of the limited discretion to choose. This, however, does not explain the strong percentage of affirmance to reversal.

\textbf{Table A} \textsuperscript{121}

\textbf{Decisions of the Court After Granting Certiorari}

<table>
<thead>
<tr>
<th></th>
<th></th>
<th></th>
<th></th>
<th></th>
<th></th>
<th></th>
<th></th>
</tr>
</thead>
<tbody>
<tr>
<td>Affirmed</td>
<td>34</td>
<td>32</td>
<td>28</td>
<td>45</td>
<td>30</td>
<td>169</td>
<td>36%</td>
</tr>
<tr>
<td>Reversed</td>
<td>75</td>
<td>52</td>
<td>61</td>
<td>55</td>
<td>56</td>
<td>299</td>
<td>64%</td>
</tr>
<tr>
<td>Total</td>
<td>109</td>
<td>84</td>
<td>89</td>
<td>100</td>
<td>86</td>
<td>468</td>
<td></td>
</tr>
</tbody>
</table>

<table>
<thead>
<tr>
<th>Cases from State Courts:</th>
<th></th>
<th></th>
<th></th>
<th></th>
<th></th>
<th></th>
<th></th>
</tr>
</thead>
<tbody>
<tr>
<td>Affirmed</td>
<td>15</td>
<td>10</td>
<td>3</td>
<td>5</td>
<td>10</td>
<td>43</td>
<td>35%</td>
</tr>
<tr>
<td>Reversed</td>
<td>29</td>
<td>7</td>
<td>17</td>
<td>15</td>
<td>12</td>
<td>80</td>
<td>65%</td>
</tr>
<tr>
<td>Total</td>
<td>44</td>
<td>17</td>
<td>20</td>
<td>20</td>
<td>22</td>
<td>123</td>
<td></td>
</tr>
</tbody>
</table>

<table>
<thead>
<tr>
<th>Cases from both Federal and State Courts:</th>
<th></th>
<th></th>
<th></th>
<th></th>
<th></th>
<th></th>
<th></th>
</tr>
</thead>
<tbody>
<tr>
<td>Affirmed</td>
<td>49</td>
<td>42</td>
<td>31</td>
<td>50</td>
<td>40</td>
<td>212</td>
<td>36%</td>
</tr>
<tr>
<td>Reversed</td>
<td>104</td>
<td>59</td>
<td>78</td>
<td>70</td>
<td>68</td>
<td>379</td>
<td>64%</td>
</tr>
<tr>
<td>Total</td>
<td>153</td>
<td>101</td>
<td>109</td>
<td>120<strong>108</strong></td>
<td>591</td>
<td></td>
<td></td>
</tr>
</tbody>
</table>

\textsuperscript{119} Frank, \textit{The United States Supreme Court, 1947-8}, 16 U. of Chi. L. Rev. 1, 34 (1948-9).

\textsuperscript{120} Table B \textit{infra}.

\textsuperscript{121} Figures for the 1948 term are based on table in 63 Harv. L. Rev. 119, 122 (1949) (Table II).

** The difference between this figure and that given in Table II as to number of certiorari granted is explained by the fact that three cases were granted certiorari and later dismissed without a ruling on the merits.
Table B  

Disposition of Cases on Appeal

<table>
<thead>
<tr>
<th></th>
<th></th>
<th></th>
<th></th>
<th></th>
<th></th>
<th></th>
</tr>
</thead>
<tbody>
<tr>
<td>Federal Courts:</td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Affirmed</td>
<td>9</td>
<td>27</td>
<td>15</td>
<td>27</td>
<td>28</td>
<td>64%</td>
</tr>
<tr>
<td>Reversed</td>
<td>10</td>
<td>12</td>
<td>12</td>
<td>14</td>
<td>11</td>
<td>36%</td>
</tr>
<tr>
<td>Total</td>
<td>19</td>
<td>39</td>
<td>27</td>
<td>41</td>
<td>39</td>
<td></td>
</tr>
<tr>
<td>State Courts:</td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Affirmed</td>
<td>12</td>
<td>7</td>
<td>11</td>
<td>6</td>
<td>7</td>
<td>63%</td>
</tr>
<tr>
<td>Reversed</td>
<td>6</td>
<td>6</td>
<td>5</td>
<td>4</td>
<td>4</td>
<td>37%</td>
</tr>
<tr>
<td>Total</td>
<td>18</td>
<td>13</td>
<td>16</td>
<td>10</td>
<td>11</td>
<td></td>
</tr>
<tr>
<td>Federal and State Courts:</td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Affirmed</td>
<td>21</td>
<td>34</td>
<td>26</td>
<td>33</td>
<td>35</td>
<td>63%</td>
</tr>
<tr>
<td>Reversed</td>
<td>16</td>
<td>18</td>
<td>17</td>
<td>18</td>
<td>15</td>
<td>37%</td>
</tr>
<tr>
<td>Total</td>
<td>37</td>
<td>52</td>
<td>43</td>
<td>51</td>
<td>50</td>
<td></td>
</tr>
</tbody>
</table>

The Court has indicated another touchstone of importance namely, numbers: either the number of cases litigated or likely to be litigated on the issue, or the number of people affected by the decision. Thus, the Court has stated: “We granted certiorari because determination of the issue raised here will guide adjustment of a large body of similar claims now pending.” Of the 16 cases this term, explicitly granted because of the importance of the issue, six were on this basis.

122. Figures for the 1948 term are based on table in 63 Harv. L. Rev. 119, 122 (1949) (Table II).

123. Because of their similar position to the plaintiff or defendant.

124. Alcoa S.S. Co. v. United States, 338 U.S. 421, 423 (1949). Also Ludecke v. Watkins, 335 U.S. 160, 162 n.2 (1948) (“We are advised that there are 530 alien enemies, ordered to depart from the United States, whose disposition awaits the outcome of this case.”).

Another factor which seems to influence the Court is the severity of the penalty imposed on the individual petitioners in criminal cases. This is natural even if its importance is denied. The figures below may be misleading to a degree, since most of the criminal cases probably arise on the Miscellaneous Docket, in \textit{in forma pauperis}, and are not included here. Of the eleven capital cases on the Appellate Docket this past term, certiorari was granted in nine. Last year, although comparative figures are not available, four capital cases were reviewed by the Court. The sentences in these cases may not have been controlling although it is the opinion of the authors that in federal cases at least, the right of review of a criminal sen-

126. Frankfurter, J., in a memorandum opinion to the denial in Rosenberg \textit{v. United States}, 344 U.S. 889 (1953) said:

"Petitioners are under death sentence, and it is not unreasonable to feel that before life is taken review should be open in the highest court of the society which has condemned them. Such right of review was the law of the land for twenty years. . . . But in 1911 Congress abolished the appeal as of right, and since then death sentences have come here only under the same conditions that apply to any criminal conviction in a federal court." But see McElwain, \textit{The Business of the Supreme Court as Conducted by Chief Justice Hughes}, 63 \textit{Harv. L. Rev.} 5, 13 n.14 (1949): " . . . occasionally he would recommend the grant of certiorari in a case of no public importance whatever simply because the decision below was unjust, unreasonable, or plainly wrong." Then in the footnote McElwain continues: "The great majority of these were \textit{capital} cases . . . in which the accused had not been adequately represented by counsel and in which there had been an obvious miscarriage of justice. . . . [Then follows an extraordinary apology for Hughes' practice.] The grant of certiorari in such cases is not contrary to the Rules in view of Rule 35 . . . ." (Italics added).

127. The late Chief Justice Vinson estimated one term that almost half of the 1597 cases before the Court were prisoner applications. Address before the American Bar Association, St. Louis Daily Record, Sept. 8, 1949, p. 6, col. 1.

The Note, \textit{The Supreme Court, 1948 Term}, 63 \textit{Harv. L. Rev.} 119 (1949) reviewing the 1948 term lists prisoner applications at about 500.


Douglas especially seems to be impressed with the importance of review when inhumane treatment or brutality is in issue. Contrast his dissent in Sweeney \textit{v. Woodall}, 344 U.S. 56, 91 (1952) with the per curiam opinion of the Court and the cold balancing of state and federal interests in Justice Frankfurter's concurrence, \textit{id.} at 90.


130. This was formerly the case, from 1889-1911. But the statute was repealed on the ground that too much of the Court's time was being expended on the flood of cases reviewed on this basis. In the early years, probably because of the backlog, there was a large number but afterwards only a trickle. Thus, 51 capital cases were reviewed in 1891; 17 capital cases were reviewed in 1894; 4 capital cases were reviewed from 1908 to 1911.
tence should be granted as a matter of course by the Supreme Court,\textsuperscript{131} similar to the practice in New York.

**Suggestions for Clarification**

It is suggested that the importance of the case should be determined by analyzing it in terms of the following dichotomy—the subject matter and the issue or the interrelationship of the two.

**Table of Issues and Subject Matter Breakdown**

A. Issues:
   a. Conflict of circuits—(Actually this includes Issue or Subject Matter but is listed here for ease of handling)
   b. Conflict between two laws:
      i. federal v. state law
      ii. state or federal law v. Constitution
      iii. regulation v. federal or state law
      iv. contract v. federal or state law or regulation
   c. Conflict between federal decision and state law (*Erie v. Tompkins*)
   d. Construction of:
      i. federal statute
      ii. regulation
      iii. contract
      iv. patent, etc.
   e. Sufficiency of evidence

B. Subject Matter:
   1. capital cases
   2. First Amendment freedoms and racial questions
   3. criminal law and procedure
   4. labor
   5. taxation
   6. aliens
   7. anti-trust

\textsuperscript{131} A similar extension to state capital offenses would probably be impractical, entailing the review of some 90-100 cases per year. \textit{Julia E. Johnson, Capital Punishment} n.29 (1939). Also by the time they reach the Supreme Court state cases may have been reviewed twice; in the federal cases, only once.
8. patents and trademarks
9. bankruptcy
10. common law federal questions (Tort Claims Act, FELA, Jones Act, etc.)
11. common law topics (diversity cases covering a host of fields, Torts, Contracts, Property, etc.)

By relating issue and subject matter (A and B) it is hoped to locate the case on a graph of relative importance, comparable to the method by which the x and y grid network in the Cartesian system determines a point. For example, FELA cases which involve the question of whether the FELA completely covers the field or whether state law applies—b, 10— would be conceded to be more important than FELA cases where only the sufficiency of evidence is involved—e, 10. Similarly a bankruptcy case in which the question whether the New York statute of limitations or the federal statute applies—b(i), 9—is more important than a similar case where that which is sought to be reviewed is the feasibility of a plan of re-organization—e, 9. The reverse is also true. A sufficiency of evidence question in a torts case—e, 11—may not be reviewed whereas the same question in a capital case—e, 1—may be looked into in great detail. These examples are clear-cut and to some extent represent the actual if not the systematic practice of the Court. 132 In close cases, an analysis which combines on the one side subject matter, and on the other, issue, may permit a Justice to examine the certiorari petition with a view toward consistency which, in the long run, will give lawyers an idea of what is meant by "importance."

As already stated, it is the authors' view that in capital cases arising under federal statutes regardless of the question of law raised by the petition, the writ should 'issue. This should add about two to five cases to the Court's docket for a year.

132. An interesting study—too complex to be considered here—is the varying review of the findings of fact depending on the subject matter and even in some cases the issue involved.


See also the varying applicability of the two court rule in patent or common law cases and in denaturalization cases. Faulkner v. Gibbs, 338 U.S. 267, 268 (1949); Comstock v. Group of Institutional Investors, 335 U.S. 211, 214 (1947); United States v. Dickinson, 331 U.S. 745, 751 (1947); Knauer v. United States, 328 U.S. 654, 657 (1945). See also Admiralty Rule 46 ½, 28 U.S.C.A. (1911).

On the different review depending on the issue—whether it is based on the construction of a federal statute or whether state legislation is questioned as unconstitutional—see, Note, 55 HARV. L. REV. 644 (1942). Also Stern, Review of Findings of Administrators, Judges and Juries: A Comparative Analysis, 58 HARV. L. REV. 70 (1944).
Despite the infrequency with which certiorari is granted in diversity cases, the Court's time is nonetheless wasted by the certiorari petitions which regularly are filed and which involve only common law issues.\textsuperscript{133} It would seem that in these cases regardless of the issue involved certiorari should be denied.\textsuperscript{134} Such a policy by the Court expressed either in a memorandum opinion\textsuperscript{135} or as a rule\textsuperscript{136} would result in the elimination, speaking conservatively, of some 60 to 80 petitions a year. A valid exception could be made in \textit{Erie v. Tompkins} cases.

\textbf{FELA; Tort Claims Act; Jones Act; Federal Safety Appliance Act; Admiralty:}—These cases are similar to those involving common law topics discussed above. They make up a large number—about 50 to 90 annually—of the petitions for certiorari with a proportionately large number of writs granted. Their similarity to common law cases would seem to warrant a similar disposition, but as seen in the table,\textsuperscript{137} a substantial proportion of the opinions of the Court each year—about 10 cases, or 10 per cent—is concerned with cases under these statutes.

Review of FELA cases has long been opposed by Justice Frankfurter. He singled out this type of case for criticism while he was a law teacher and has continued his opposition on the bench—refusing to record his vote in many cases on the grounds that certiorari should

\begin{center}
\begin{tabular}{|c|c|c|c|c|c|c|c|c|c|}
\hline
Common Law Topics & 1929 & '30 & '31 & '32 & '33 & '34 & '35 & '36 & '37 & '38 & '39 & '40 & '41 & '42 & '43 & '44 & '45 & '46 & '47 & '48 & '49 & '50 & '51 & '52 \\
\hline
Cert. Denied & 133 & 85 & 82 & 113 & 130 & 122 & 110 & 99 & 105 & 113 & Not Available & 77 \\
Total Petitions & 135 & 95 & 95 & 123 & 142 & 129 & 116 & 112 & 120 & 118 & 80 \\
\hline
\end{tabular}
\end{center}

\textsuperscript{133} The Court formerly asserted such a blanket denial in the common law cases which sought review on the grounds that the decision was a violation of due process. But apparently even this is not to be relied on. \textit{54 Harv. L. Rev.} 1066 (1941).

\textsuperscript{134} Similar to the Taft opinion in \textit{Magnum Import Co. v. Coty}, 262 U.S. 159, 163 (1923).


\textsuperscript{137}
not have been granted.\textsuperscript{138} Many of these cases involve merely the sufficiency of evidence.\textsuperscript{139} They are time consuming since they involve the complete review of the record. Since the time of the Court, we are told, is so precious,\textsuperscript{140} and since the result cannot be generalized beyond the particular case, the review of this type of case seems unjustifiable.\textsuperscript{141} Denial would mean elimination of 30 to 40 petitions a year.\textsuperscript{142} Where the issue involves solely the construction of the Act—d—almost always a question of coverage, the writ might well be restricted to those cases where there is a conflict of circuits recognized by the court of appeals or perhaps where there is a dissenting opinion below.\textsuperscript{143}

<table>
<thead>
<tr>
<th>Admiralty</th>
<th>1929 '30 '31 '32 '33 '34 '35 '36 '37 '38 '48 '49 '50 '51 '52</th>
</tr>
</thead>
<tbody>
<tr>
<td>Cert. Granted</td>
<td>10 3 10 5 6 8 4 2 2 1 3 1 2 6 3</td>
</tr>
<tr>
<td>Cert. Denied</td>
<td>23 34 34 23 25 25 23 22 18 7 11</td>
</tr>
<tr>
<td>Total</td>
<td>33 37 44 28 31 33 27 24 20 8 14</td>
</tr>
</tbody>
</table>

| Federal Safety Appli- | 1929 '30 '31 '32 '33 '34 '35 '36 '37 '38 '48 '49 '50 '51 '52 |
| ance Act |------------------------------------------------------------|
| Cert. Granted | 0 0 |
| Cert. Denied | 4 |
| Total | 4 |


\textsuperscript{139} Fifty-five petitions for certiorari in FELA suits were presented on this issue alone from 1943 through the 1947 term. Twenty of these were granted certiorari, a phenomenal percentage of 37%. Wilkerson v. McCarthy, 336 U.S. 53, 70 (1949) (Douglas, J. concurring).


Yet in New York ex rel. Consolidated Water Co. v. Maltbie, 303 U.S. 158 (1938), the Court dismissed the appeal because sufficiency of evidence to support a jury finding did not raise a substantial federal question.

\textsuperscript{140} Maryland v. Baltimore Radio Show, Inc., 338 U.S. 912, 918 (1950) (Frankfurter, J. concurring).

Justice Frankfurter would extend the denial of certiorari in sufficiency of evidence questions to other subject matter areas. United States v. Knight, 336 U.S. 505, 509 (1949) (refusing to record his vote where sufficiency of evidence to convict for violation of the Bankruptcy Act was the subject of the suit); Nye & Nissen v. United States, 336 U.S. 613, 622 (1949) (refusal to review 4,630 pages on sufficiency of evidence in another criminal prosecution).

Where there is no such burden of review apparently he would look to the sufficiency of the evidence even in FELA cases. Reynolds v. Atlantic Coast Line R.R., 336 U.S. 207, 209 (1949).

\textsuperscript{141} Review is quite plainly, almost expressly, based on merit; the Court reversing in every case except one (4 justices dissenting in that one) where a court held the defendant entitled to a directed verdict.

The cases for the years 1942 through 1945 are discussed in Griswold v. Gardner, 155 F.2d 333, 334 (7th Cir. 1946).

\textsuperscript{142} See note 137 supra.

\textsuperscript{143} This is not the same as the New York rule. There, a dissent in the Appellate Division gives an automatic appeal to the highest court. We suggest a more stringent operation: a dissenting opinion first permits one to ask for certiorari.
Because of the persuasive weight of one circuit court case on another, it could be assumed that if a circuit court refuses to follow the lead of another, the issue is not trivial. There is, however, a difficulty here. Almost every brief in support of certiorari cites cases in “direct conflict” with the one at bar. The solution, in the opinion of the authors, is to make the determination of the direct conflict in this field—and in others to be mentioned below—depend on the circuit court judges themselves. This can be done in either of two ways: (1) by considering the petition for certiorari if the case is cited in the opinion below as in conflict, or (2) by requiring a jurisdictional statement from the circuit court acknowledging the possible conflict. If the issues are any of the variants of b, the usual latitude of discretion should prevail.  

The Court has stated that in patent cases where the issue is one of infringement it will not ordinarily review the case unless there is a conflict of circuits. Review of patent cases has dropped considerably in recent years and probably the number of certiorari petitions has also decreased. However, where the question is one of law no such requirement is necessary. Whether or not this is wise, the point is that the Court here has clarified the matter for the lawyer.

The Court’s consistent preference for taxation, criminal law, and labor cases might be noted. There has been an increased interest in anti-trust and in recent years a corresponding refusal to accept bankruptcy cases. This last tendency has provoked the suggestion in this series previously that review in this type of case be entirely eliminated except where there is a conflict in the circuits, admitted by the court of appeals.

144. Some degree of discretion is always necessary. It is not hoped to convert certiorari into a push-pull, click-click operation. Time factors among other things may dictate a refusal of certiorari in an important case.

145. ROBERTSON AND KIRKHAM, op. cit. supra note 78, at 701.

146. There seems to be some doubt as to the power of review of the Supreme Court of patent cases from the Court of Customs and Patent Appeals. ROBERTSON AND KIRKHAM, op. cit. supra note 78, at 442 et seq.

147. Patents

<table>
<thead>
<tr>
<th>Year</th>
<th>1929 '30 '31 '32 '33 '34 '35 '36 '37 '38 '48 '49 '50 '51 '52</th>
</tr>
</thead>
<tbody>
<tr>
<td>Cert. Granted</td>
<td>10 3 4 3 4 15 10 3 11 12 3 3 1 1 3</td>
</tr>
<tr>
<td>Cert. Denied</td>
<td>22 31 32 41 36 31 35 28 48 39</td>
</tr>
<tr>
<td>Total</td>
<td>32 34 36 44 40 46 45 31 57 51</td>
</tr>
</tbody>
</table>

148. ROBERTSON AND KIRKHAM, op. cit. supra note 78, at 707.

149. Taxation

<table>
<thead>
<tr>
<th>Year</th>
<th>1929 '30 '31 '32 '33 '34 '35 '36 '37 '38 '48 '49 '50 '51 '52</th>
</tr>
</thead>
<tbody>
<tr>
<td>Cert. Granted</td>
<td>59 57 30 55 56 28 49 28 42 28 15 11 7 5 16</td>
</tr>
<tr>
<td>Cert. Denied</td>
<td>108 115 129 125 172 135 169 108 105 113</td>
</tr>
<tr>
<td>Total</td>
<td>167 172 159 180 228 163 218 136 147 141</td>
</tr>
</tbody>
</table>

166
It is obvious that certain subjects become more or less important, as a result of changing conditions and new legislation. Review thus must be somewhat cyclical. *Erie v. Tompkins* and then a series of cases explaining it; Taft-Hartley and then a burst of cases interpreting it are examples. Certain statutes immediately clamor for construction—many people are seriously affected. Other statutes are slower to take effect—the Patent Act, perhaps, or a code of civil procedure.

If the Court wishes to do more than complain about the many petitions filed which probably are “unimportant,” it will have to recognize that Rule 38 as interpreted gives no standard whatsoever and that ‘something has to be done so that the bar can understand “importance.” The type of explanation should be twofold; first, a statement of reasons when certiorari is granted; second, periodically, in certain areas where decision has been reached not to grant certiorari, a memorandum opinion notifying the bar to this effect. The type of statement or memorandum opinion has been suggested above—one which is specific and directed toward the combination of the subject matter of the case and the issue presented in the case. Additional policies have been suggested in previous articles in this series. It is estimated that if these policies were followed, some 100 to 200 petitions a year would be eliminated and a corresponding amount of the Court’s time and clients’ money saved.

<table>
<thead>
<tr>
<th>Crim. Law and Procedure *</th>
<th>'30 '31 '32 '33 '34 '35 '36 '37 '38 '48 '49 '50 '51 '52</th>
</tr>
</thead>
<tbody>
<tr>
<td>Cert. Granted</td>
<td>5 2 1 4 4 2 7 20 4 24 16 39 22 17</td>
</tr>
<tr>
<td>Cert. Denied</td>
<td>28 30 28 49 53 50 33 71 91</td>
</tr>
<tr>
<td>Total</td>
<td>33 32 29 53 57 52 40 91 95</td>
</tr>
<tr>
<td>Labor</td>
<td>'30 '31 '32 '33 '34 '35 '36 '37 '38 '48 '49 '50 '51 '52</td>
</tr>
<tr>
<td>Cert. Granted</td>
<td>9 7 12 16 11 5 18</td>
</tr>
<tr>
<td>Cert. Denied</td>
<td>6 7</td>
</tr>
<tr>
<td>Total</td>
<td>15 14</td>
</tr>
<tr>
<td>Bankruptcy</td>
<td>1929 '30 '31 '32 '33 '34 '35 '36 '37 '38 '48 '49 '50 '51 '52</td>
</tr>
<tr>
<td>Cert. Granted</td>
<td>0 6 4 11 7 26 16 19 5 11 5 1 1 0 3</td>
</tr>
<tr>
<td>Cert. Denied</td>
<td>33 22 20 34 49 49 72 82 71 57</td>
</tr>
<tr>
<td>Total</td>
<td>33 28 24 45 56 75 88 101 76 68</td>
</tr>
<tr>
<td>Anti-Trust</td>
<td>1929 '30 '31 '32 '33 '34 '35 '36 '37 '38 '48 '49 '50 '51 '52</td>
</tr>
<tr>
<td>Cert. Granted</td>
<td>3 1 0 2 4 3 2 4 1 0 4 2 4 8 4</td>
</tr>
<tr>
<td>Cert. Denied</td>
<td>4 7 3 2 6 2 6 0 3</td>
</tr>
<tr>
<td>Total</td>
<td>7 8 3 4 4 4 9 4 10 3</td>
</tr>
</tbody>
</table>

*One cannot tell about what was included in these figures in past years and hence whether they are really comparable.*

150. See note 97 *supra.*

CONCLUSION

In concluding this and the series of articles on the Supreme Court certiorari jurisdiction, the writers humbly acknowledge the magnitude and complexity of the Court's problem. It is easy to criticize—especially when there is so much room for it—but the answer is not so easy. There is little doubt that the behavior of the Court in this area is unsatisfactory—even to the Justices themselves. It may be that the meaning of a "certiorari denied" will always be disputed; that explanations of action taken or not taken cannot always feasibly be made; that what goes on behind the purple curtain may forever remain somewhat of a mystery. Perhaps, if these things are true, it is one of the inevitable compromises that must be made by men striving to be free in an epoch of complexity and anxiety. One point remains clear: the work which the Supreme Court does not do is as important as the work which it does.

Following are the usual facts and figures on the Court's non-feasance for the 1952 term.

WORK OF THE TERM

<table>
<thead>
<tr>
<th>TABLE I</th>
</tr>
</thead>
<tbody>
<tr>
<td>DISPOSITION OF CASES BY DOCKETS</td>
</tr>
</tbody>
</table>

<table>
<thead>
<tr>
<th>1. Appellate Docket</th>
</tr>
</thead>
<tbody>
<tr>
<td>Total Cases</td>
</tr>
<tr>
<td>1950</td>
</tr>
<tr>
<td>783</td>
</tr>
<tr>
<td>Cases disposed of:</td>
</tr>
<tr>
<td>By written opinions</td>
</tr>
<tr>
<td>1950</td>
</tr>
<tr>
<td>114</td>
</tr>
<tr>
<td>By per curiam orders or opinions</td>
</tr>
<tr>
<td>1950</td>
</tr>
<tr>
<td>74</td>
</tr>
<tr>
<td>By motion to dismiss or by stipulation</td>
</tr>
<tr>
<td>1950</td>
</tr>
<tr>
<td>4</td>
</tr>
<tr>
<td>By denial or dismissal of petitions for certiorari</td>
</tr>
<tr>
<td>1950</td>
</tr>
<tr>
<td>495</td>
</tr>
<tr>
<td>Total disposed of</td>
</tr>
<tr>
<td>1950</td>
</tr>
<tr>
<td>687</td>
</tr>
<tr>
<td>Remaining on docket</td>
</tr>
<tr>
<td>1950</td>
</tr>
<tr>
<td>96</td>
</tr>
</tbody>
</table>

<table>
<thead>
<tr>
<th>2. Miscellaneous Dockets</th>
</tr>
</thead>
<tbody>
<tr>
<td>Total cases</td>
</tr>
<tr>
<td>1950</td>
</tr>
<tr>
<td>539</td>
</tr>
<tr>
<td>Cases disposed of:</td>
</tr>
<tr>
<td>By transfer to appellate docket</td>
</tr>
<tr>
<td>1950</td>
</tr>
<tr>
<td>14</td>
</tr>
<tr>
<td>By per curiam order or opinion</td>
</tr>
<tr>
<td>1950</td>
</tr>
<tr>
<td>3</td>
</tr>
<tr>
<td>By denial or dismissal of certiorari</td>
</tr>
<tr>
<td>1950</td>
</tr>
<tr>
<td>386</td>
</tr>
<tr>
<td>By denial or withdrawal of other applications</td>
</tr>
<tr>
<td>1950</td>
</tr>
<tr>
<td>121</td>
</tr>
<tr>
<td>Total disposed of</td>
</tr>
<tr>
<td>1950</td>
</tr>
<tr>
<td>524</td>
</tr>
<tr>
<td>Remaining on docket</td>
</tr>
<tr>
<td>1950</td>
</tr>
<tr>
<td>15</td>
</tr>
</tbody>
</table>
3. Original Docket
   Total cases  13  9  11
   Cases disposed of  5  0  0
   Remaining on docket  8  9  11

4. All Dockets
   Total cases (Sum of 1-2-3)  1335  1368  1437
   Cases disposed of  1216  1222  1286
   Remaining on dockets  119  146  151

TABLE II
PER CURIAM ORDERS OR OPINIONS

1. Total orders or opinions  92  77  99  82

2. Merits actually argued:
   Certiorari cases:
      Affirmed after argument  5  5  7  7
      Reversed after argument  4  2  7  1
      Certiorari granted, continued to
      next term  0  2  2  0
      Motion for reconsideration continued  0  1  0  0
   Appeal cases:
      Affirmed after argument  5  0  4  2
      Reversed after argument  3  1  3  1
      Dismissed after argument  0  0  2  0
      Dismissed but certiorari later granted  0  1  0  0
   Total—merits argued  17  12  25  11

3. Disposed of without argument:
   Certiorari cases:
      Reversed, remanded, or dismissed on
      motion  13  21  12  16
      Affirmed  0  0  0  1
   Appeal cases:
      Dismissed  38  32  41  36
      Dismissed in part, affirmed in part  0  1  0  0
      Affirmed  23  9  15  13
      Reversed  1  2  6  2
      Judgment vacated and dismissed  0  0  0  1
      Motion to intervene denied  0  0  0  1
      Asked to state its views in argument,
      else reversal; case later argued  0  0  0  1
   Total—merits not argued  75  65  74  71
Table III
Disposition With and Without Argument on Merits

1. Cases disposed of after argument on the merits:
   - Original docket
     - 1950: 5
     - 1951: 0
     - 1952: 0
   - Signed opinions
     - 1950: 114
     - 1951: 98
     - 1952: 109
   - Per curiam opinions or orders
     - 1950: 12
     - 1951: 25
     - 1952: 11
   - Total
     - 1950: 131
     - 1951: 123
     - 1952: 120

2. Cases disposed of without hearing argument on the merits:
   - Denied certiorari, Appellate Docket
     - 1950: 495
     - 1951: 518
     - 1952: 545
   - Dismissed on motion or per stipulation, Appellate Docket
     - 1950: 4
     - 1951: 4
     - 1952: 10
   - Denied certiorari, Miscellaneous Docket
     - 1950: 386
     - 1951: 386
     - 1952: 428
   - Denied or withdrew other applications, Miscellaneous Docket
     - 1950: 121
     - 1951: 102
     - 1952: 103
   - Disposed of by per curiam orders or opinions
     - 1950: 65
     - 1951: 74
     - 1952: 71
   - Total
     - 1950: 1071
     - 1951: 1084
     - 1952: 1157

3. Total cases disposed of*
   - 1950: 1202
   - 1951: 1222
   - 1952: 1286

4. Of all cases disposed of, the percentage in which the merits were actually argued
   - 1950: 10.9%
   - 1951: 10.2%
   - 1952: 10.4%

Table IV
Analysis of the Rulings of the Court During the 1952 Term
Granting and Denying Review

1. Cases granting review:
   - Appellate Docket:
     - Appeals:
       - Probable jurisdiction noted and jurisdiction postponed
         - 1951: 35
         - 1952: 33
       - Per curiam affirmed
         - 1951: 15
         - 1952: 13
       - Per curiam reversed
         - 1951: 6
         - 1952: 2
       - Total appeals granted review
         - 1951: 56
         - 1952: 48

*The difference between these figures and the "total disposed of" in Table I is accounted for by the double inclusion in the Official Statistics (Table I) of the Miscellaneous Docket cases transferred to the Appellate Docket upon the granting of certiorari.
Certioraris:
  Per curiam orders 8 16
  Certiorari granted 78 95
  Total certioraris granted review 86 111
  Total cases granted review 165 159

2. Cases denying review:
   Appellate Docket:
     Appeals:
       Dismissed for want of a substantial federal question 37 27
       Not made in time—28 U. S. C. 2101(c) 0 3
       Dismissed for want of jurisdiction 4 5
       Case moot 0 1
       Total appeals dismissed 41 37
       Certiorari denied 518 545
   Miscellaneous Dockets:
     Certiorari denied 386 428
     Total cases denied review 945 1010

3. Total applications for review (not withdrawn) 1110 1169

**Table V-A**

**Comparative Statistics**

<table>
<thead>
<tr>
<th></th>
<th>1949</th>
<th>1950</th>
<th>1951</th>
<th>1952</th>
</tr>
</thead>
<tbody>
<tr>
<td>All cases on the Appellate Docket</td>
<td>867</td>
<td>783</td>
<td>827</td>
<td>863</td>
</tr>
<tr>
<td>Disposed of on the merits</td>
<td>201</td>
<td>192</td>
<td>196</td>
<td>197</td>
</tr>
<tr>
<td>Disposed of by denial of certiorari</td>
<td>556</td>
<td>495</td>
<td>518</td>
<td>545</td>
</tr>
<tr>
<td>Remaining on docket at term end</td>
<td>110</td>
<td>96</td>
<td>113</td>
<td>121</td>
</tr>
<tr>
<td>Percentage cases disposed on merits</td>
<td>23%</td>
<td>25%</td>
<td>24%</td>
<td>23%</td>
</tr>
<tr>
<td>Percentage cases denied certiorari</td>
<td>64%</td>
<td>64%</td>
<td>62%</td>
<td>63%</td>
</tr>
<tr>
<td>Percentage work left undone</td>
<td>13%</td>
<td>11%</td>
<td>14%</td>
<td>14%</td>
</tr>
<tr>
<td>All cases on the Miscellaneous Dockets</td>
<td>568</td>
<td>539</td>
<td>532</td>
<td>563</td>
</tr>
<tr>
<td>Disposed of on the merits</td>
<td>7</td>
<td>17</td>
<td>20</td>
<td>13</td>
</tr>
<tr>
<td>Disposed of by denial of certiorari</td>
<td>436</td>
<td>386</td>
<td>386</td>
<td>428</td>
</tr>
</tbody>
</table>
Disposed of by denial or withdrawal of other applications 108 121 102 103
Remaining on docket at term end 17 15 24 19
Percentage cases disposed on merits 1.2% 3.1% 3.9% 2.3%
Percentage cases denied certiorari 77% 72% 72.6% 75%
Percentage cases disposed by denial or withdrawal of other applications 18.9% 22% 19% 18.3%
Percentage work left undone 2.9% 2.9% 4.5% 3.3%

Table V-B
Comparative Statistics on Denials of Review

<table>
<thead>
<tr>
<th>Year</th>
<th>Total rulings on review</th>
<th>Denials of review:</th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
<td></td>
<td>Certiorari denied, Appellate Docket</td>
</tr>
<tr>
<td></td>
<td></td>
<td>Certiorari denied, Miscellaneous Docket</td>
</tr>
<tr>
<td></td>
<td></td>
<td>Appeals dismissed</td>
</tr>
<tr>
<td></td>
<td></td>
<td>Total denials of review</td>
</tr>
</tbody>
</table>

Percentage of total rulings, percentage denials 87.6% 86.5% 85.6% 86.4%

Table V-C

<table>
<thead>
<tr>
<th>Year</th>
<th>Total rulings on review</th>
<th>Rulings on applications for other relief (Miscellaneous Docket)</th>
<th>Total rulings on review or relief</th>
<th>Total denials of review</th>
</tr>
</thead>
<tbody>
<tr>
<td>1949</td>
<td>1179</td>
<td>108</td>
<td>1287</td>
<td>1033</td>
</tr>
<tr>
<td>1950</td>
<td>1057</td>
<td>121</td>
<td>1178</td>
<td>914</td>
</tr>
<tr>
<td>1951</td>
<td>1110</td>
<td>102</td>
<td>1212</td>
<td>945</td>
</tr>
<tr>
<td>1952</td>
<td>1169</td>
<td>103</td>
<td>1272</td>
<td>1010</td>
</tr>
<tr>
<td>4 year total</td>
<td></td>
<td></td>
<td>4515</td>
<td>3902</td>
</tr>
</tbody>
</table>
Refusals of other relief
(Miscellaneous Docket) 108 121 102 103 434
Total denials of review or relief 1141 1035 1047 1113 4336
Percentage of total rulings that are denials of review or relief 89% 87.8% 86.4% 87.5% 87.6%

Dissent to the action of the Court in denying review
A. BY INDIVIDUAL JUSTICES

<table>
<thead>
<tr>
<th>Year</th>
<th>Black</th>
<th>Douglas</th>
<th>Reed</th>
<th>Burton</th>
<th>Jackson</th>
<th>Total</th>
</tr>
</thead>
<tbody>
<tr>
<td>1949</td>
<td>34</td>
<td>15</td>
<td>3</td>
<td>1</td>
<td>1</td>
<td>50</td>
</tr>
<tr>
<td>1950</td>
<td>33</td>
<td>21</td>
<td>4</td>
<td>1</td>
<td>0</td>
<td>48</td>
</tr>
<tr>
<td>1951</td>
<td>41</td>
<td>20</td>
<td>3</td>
<td>2</td>
<td>1</td>
<td>65</td>
</tr>
<tr>
<td>1952</td>
<td>32</td>
<td>24</td>
<td>4</td>
<td>7</td>
<td>4</td>
<td>56</td>
</tr>
<tr>
<td>Total</td>
<td>140</td>
<td>80</td>
<td>14</td>
<td>7</td>
<td>4</td>
<td>219</td>
</tr>
</tbody>
</table>

B. COMBINATIONS OF JUSTICES BY CASES

<table>
<thead>
<tr>
<th>Year</th>
<th>Black alone</th>
<th>Douglas alone</th>
<th>Reed alone</th>
<th>Burton alone</th>
<th>Black and Douglas</th>
<th>Black, Douglas and Reed</th>
<th>Black, Douglas and Burton</th>
<th>Black and Burton</th>
<th>Black and Jackson</th>
<th>Black and Reed</th>
<th>Douglas and Reed</th>
<th>Jackson, Burton and Vinson</th>
<th>Jackson, Reed and Clark</th>
<th>Jackson and Reed</th>
<th>Total cases in which dissents were noted</th>
</tr>
</thead>
<tbody>
<tr>
<td>1949</td>
<td>15</td>
<td>2</td>
<td>1</td>
<td>1</td>
<td>12</td>
<td>1</td>
<td>0</td>
<td>0</td>
<td>0</td>
<td>1</td>
<td>0</td>
<td>0</td>
<td>0</td>
<td>0</td>
<td>34</td>
</tr>
<tr>
<td>1950</td>
<td>9</td>
<td>8</td>
<td>2</td>
<td>1</td>
<td>11</td>
<td>2</td>
<td>0</td>
<td>1</td>
<td>0</td>
<td>1</td>
<td>0</td>
<td>0</td>
<td>0</td>
<td>0</td>
<td>33</td>
</tr>
<tr>
<td>1951</td>
<td>18</td>
<td>3</td>
<td>3</td>
<td>0</td>
<td>14</td>
<td>2</td>
<td>1</td>
<td>1</td>
<td>1</td>
<td>2</td>
<td>1</td>
<td>0</td>
<td>0</td>
<td>0</td>
<td>41</td>
</tr>
<tr>
<td>1952</td>
<td>5</td>
<td>5</td>
<td>4</td>
<td>0</td>
<td>16</td>
<td>2</td>
<td>1</td>
<td>2</td>
<td>0</td>
<td>1</td>
<td>1</td>
<td>0</td>
<td>0</td>
<td>1</td>
<td>32</td>
</tr>
<tr>
<td>Total</td>
<td>47</td>
<td>18</td>
<td>6</td>
<td>2</td>
<td>53</td>
<td>6</td>
<td>2</td>
<td>2</td>
<td>1</td>
<td>1</td>
<td>1</td>
<td>0</td>
<td>0</td>
<td>1</td>
<td>140</td>
</tr>
</tbody>
</table>
WHAT THE SUPREME COURT DID NOT DO IN 1952

<table>
<thead>
<tr>
<th>Subject Matter of Cases From the Appellate Docket Granted and Denied Review</th>
<th>Denied</th>
<th>Written</th>
<th>Total</th>
</tr>
</thead>
<tbody>
<tr>
<td>Admiralty</td>
<td>11</td>
<td>3</td>
<td>14</td>
</tr>
<tr>
<td>Shipping</td>
<td>6</td>
<td>0</td>
<td>6</td>
</tr>
<tr>
<td>Jones Act</td>
<td>5</td>
<td>1</td>
<td>6</td>
</tr>
<tr>
<td>Aliens and Citizenship</td>
<td>9</td>
<td>5</td>
<td>14</td>
</tr>
<tr>
<td>Anti-Trust</td>
<td>14</td>
<td>4 (3)</td>
<td>21</td>
</tr>
<tr>
<td>Agricultural Production and Control</td>
<td>9</td>
<td>0</td>
<td>9</td>
</tr>
<tr>
<td>Army and Navy</td>
<td>10</td>
<td>5</td>
<td>15</td>
</tr>
<tr>
<td>Administrative Law</td>
<td>13</td>
<td>3 (1)</td>
<td>17</td>
</tr>
<tr>
<td>Bankruptcy</td>
<td>17</td>
<td>2 (1)</td>
<td>20</td>
</tr>
<tr>
<td>Common Law Topics</td>
<td>69</td>
<td>1 (1)</td>
<td>71</td>
</tr>
<tr>
<td>Tort Claims Act and Public Contracts</td>
<td>15</td>
<td>0 (3)</td>
<td>18</td>
</tr>
<tr>
<td>FELA</td>
<td>11</td>
<td>3</td>
<td>14</td>
</tr>
<tr>
<td>Federal Safety Appliance Act</td>
<td>4</td>
<td>0</td>
<td>4</td>
</tr>
<tr>
<td>Criminal Law</td>
<td>87</td>
<td>12 (6)</td>
<td>105</td>
</tr>
<tr>
<td>Civil Rights</td>
<td>9</td>
<td>1 (1)</td>
<td>11</td>
</tr>
<tr>
<td>Domestic Relations</td>
<td>7</td>
<td>2 (2)</td>
<td>11</td>
</tr>
<tr>
<td>Eminent Domain</td>
<td>5</td>
<td>0</td>
<td>5</td>
</tr>
<tr>
<td>Federal Power Act</td>
<td>5</td>
<td>3</td>
<td>8</td>
</tr>
<tr>
<td>Food, Drugs, and Cosmetics</td>
<td>6</td>
<td>1</td>
<td>7</td>
</tr>
<tr>
<td>Federal Jurisdiction and Procedure</td>
<td>31</td>
<td>6</td>
<td>37</td>
</tr>
<tr>
<td>Government Personnel</td>
<td>7</td>
<td>0 (1)</td>
<td>8</td>
</tr>
<tr>
<td>Labor</td>
<td>35</td>
<td>12 (6)</td>
<td>53</td>
</tr>
<tr>
<td>Patents and Copyrights</td>
<td>19</td>
<td>3 (2)</td>
<td>24</td>
</tr>
<tr>
<td>Taxation</td>
<td>50</td>
<td>13 (3)</td>
<td>66</td>
</tr>
<tr>
<td>Cases Under Miscellaneous Statutes</td>
<td>24</td>
<td>9 (2)</td>
<td>35</td>
</tr>
</tbody>
</table>

a—Figures do not include companion cases.

b—Signed opinions only. Per Curiam Opinions are not included anywhere in this table.

c—Figures in parenthesis, totalling 32, are those cases which in the opinion of the authors warranted full review although they did not receive it. They include companion cases.